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Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture

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Abstract Conventional understanding distinguishes between criminal law (and procedures) and civil law (and procedures). These distinctions often rest upon differences as to the moving party, the culpability of a wrongdoer, the nature of a wrong, the remedy available, etc. to determine whether a particular action ought to fall upon the civil or the criminal side of the paradigmatic divide. These distinctions, however, prove problematic in relation to hybrid systems of justice, given legislative attempts to pursue criminal law objectives using civil processes. Using the non-conviction-based asset forfeiture model adopted in Ireland, and drawing upon the test adopted by the US Supreme Court as to what distinguishes the civil from the criminal, this article examines how the Irish judiciary has responded to this approach, ultimately contending that the courts have failed to provide a check against the legislature circumventing enhanced procedural protections of the criminal process and imposing punishment in the civil forum. The article concludes by asking whether a hybrid, or middle-ground, process, in which some enhanced procedural protections are afforded to a person confronted with punitive civil sanctions, offers an alternative to the rigid confines of the conventional civil/criminal dichotomy.

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The dichotomy between civil and criminal matters is long since established. In *Atcheson v Everitt*, Lord Mansfield stated: 'Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions'.¹ This distinction is often said to rest on a number of key differences between the two paradigms,² namely: (1) Criminal liability can only be imposed where the wrongdoer is subjectively culpable,³ whereas liability can be imposed in civil actions where it is shown that the wrongdoer was objectively culpable.⁴ (2) The role of a prosecution authority acting on behalf of the State is generally seen as indicative of a criminal matter.⁵ Since criminal offences are regarded as matters of public concern,⁶ criminal proceedings are usually instigated by the State (or its representatives) on behalf of the public at large. Civil proceedings, in contrast, are generally taken by private individuals, with the public interest in the act being merely incidental. (3) As civil matters are concerned with individual interests, they (usually) require actual damage to a specific individual before liability may be imposed. (4) There are a number of powers afforded to State authorities in criminal matters that are not usually available in civil proceedings. For example, powers of arrest, detention, entry, search and seizure, to name but a few, are generally associated with investigations into criminal activity.⁷ (5) These intrusive investigatory powers are balanced by rules of evidence, at the trial stage, which are much more restrictive in criminal proceedings than their civil counterparts.⁸ The paradigmatic divide, then, is reflected in, *inter alia*, the different rules of procedure, burdens of proof, rules of discovery, investigatory practices and modes of punishment.⁹ (6) Criminal law achieves its aim by means of punishment (or threatened punishment) of offenders (or potential offenders). Civil law, in contrast, has as its purpose the restitution or compensation of a wronged party. As Holdsworth points out, 'a suit by a private person sounds in damages, whereas a

1 1 Cowper 382 at 391.

2 Cf. J. Hall, 'Interrelations of Criminal Law and Torts: I' (1943) *Columbia LR* 753.

3 *R v G* [2004] 1 AC 1034; *The People (DPP) v Murray* [1977] IR 360.

4 *McQuire v Western Morning News Co. Ltd* [1903] 2 KB 100; *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205; *Glasgow Corporation v Muir* [1943] AC 448.

5 Blackstone 3 *Commentaries* 3.

6 J. F. Stephen, *A History of the Criminal Law of England*, vol. II (William S. Hein reprint: 1883) 76.

7 See, generally, D. Walsh, *Criminal Procedure* (Thomson Round Hall: Dublin, 2002); A. Ashworth and M. Redmayne, *The Criminal Process*, 4th edn (Oxford University Press: Oxford, 2010).

8 A. S. Goldstein, 'The State and the Accused: Balance of Advantage in Criminal Procedure' (1960) 69 *Yale LJ* 1149.

9 See, e.g., P. Roberts, 'Taking the Burden of Proof Seriously' [1995] *Crim LR* 783; V. Tadros and S. Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 *MLR* 402.

suit by the king ends in the punishment of the guilty party'.¹⁰ (7) An adverse civil judgment does not carry the same social condemnation as does a criminal conviction. As Stephen notes, the criminal law 'proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it'.¹¹ For Hart, the stigma attached to a criminal conviction is what distinguishes a person who has been committed to a mental institution from the convict sentenced to a penal institution. Only the convict will experience 'the moral condemnation of his community'.¹²

Recent decades, however, have witnessed many jurisdictions, across the world, seeking to pursue criminal law objectives in the civil realm through, for example, the use of anti-social behaviour orders, serious crime prevention orders and control orders to tackle low-level criminality and anti-social behaviour, serious crime, and terrorism, respectively. The adoption of civil processes for crime-control strategies is strikingly illustrated by contemporary non-conviction-based asset forfeiture (or civil forfeiture) legislation, where an 'accused', facing the prospect of being deprived of assets on the grounds that they constitute proceeds of crime, will have to demonstrate to the court that this is not so. Failure to do so could see those assets being forfeited to the State. This innovative procedure is welcomed by law enforcement agencies on the grounds that it is much more efficient and expedient than conventional (and more cumbersome) criminal procedure.¹³ Critics, however, have been vociferous in proclaiming that a non-conviction-based approach allows the State to circumvent traditional safeguards of the criminal process.

While the debate as to due process implications of the non-conviction-based approach has been ongoing for quite some time, there is another persistent question regarding the use of civil remedies in pursuit of criminal law objectives, namely what constitutional limits constrain their use?¹⁴ This article critically appraises how the Irish model of non-conviction-based asset forfeiture has withstood constitutional scrutiny, arguing that the Irish courts have failed to look beyond the 'civil' label, thereby prioritising the legislative label over the actual

10 W. S. Holdsworth, *A History of English Law*, vol. II, 4th edn (Sweet & Maxwell: London, 2003) 453.

11 Stephen, above n. 6 at 81.

12 Henry M. Hart Jr, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401 at 406.

13 A. Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds' (2004) 12(1) *Journal of Financial Crime* 8; T. P. Farley, 'Asset Forfeiture Reform: A Law Enforcement Response' (1994) 39 *New York Law School LR* 149.

14 M. M. Cheh, 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction' (1991) 42(5) *Hastings LJ* 1325.

substance of the Proceeds of Crime Acts 1996–2005 and thus facilitating the use of civil processes as a crime-control strategy. Indeed, the imposition of civil sanctions that are functionally equivalent to the criminal sanction undermines the exclusivity of the criminal sanction.¹⁵

The Irish regime offers a wealth of information for policymakers, practitioners and scholars alike. Yet, while there has been discussion of the adoption of the non-conviction-based approach, as well as theoretical and comparative examination of the Irish model of non-conviction-based asset forfeiture,¹⁶ analysis of the Irish model remains relatively underdeveloped.¹⁷ This article aims to take one step in furthering knowledge of non-conviction-based asset forfeiture by focusing on how the Irish judiciary have responded to this radical new weapon in the armoury of the State.¹⁸ It will be demonstrated that the non-conviction-based approach allows the State to pursue criminal law objectives in the civil realm, absent enhanced procedural protections of the criminal process. The Irish model is deliberately chosen here for the following reasons: first, the Irish adoption of a non-conviction-based asset forfeiture model in 1996 shone a beacon which a number of other common law jurisdictions have since followed.¹⁹ Secondly, in the 15 years that this model has been in force it has been conclusively ruled that the legislation passes constitutional muster and does not require enhanced procedural protections of the criminal process as the scheme falls on the civil side of the paradigmatic divide. Thirdly, given that the UK Supreme Court²⁰ has recently delivered judgment on the civil nature of

15 D. Dripps, 'The Exclusivity of the Criminal Law: Toward a "Regulatory Model" of, or "Pathological Perspective" on, the Civil–Criminal Distinction' (1996) 7 *Journal of Contemporary Legal Issues* 199 at 202.

16 See, e.g., J. Meade, 'Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture' (2000) 10(1) *Irish Criminal Law Journal* 11; L. Campbell, 'Theorising Asset Forfeiture in Ireland' (2007) 71 *JCL* 441; L. Campbell, 'The Recovery of "Criminal" Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm' (2010) 41(1) *Victoria University of Wellington Law Review* 15.

17 For example, there has been little scrutiny of the agency—the Criminal Assets Bureau—tasked with implementing the proceeds of crime legislation; why is the Bureau widely lauded as a success story while similar agencies in the United Kingdom (e.g. the Assets Recovery Agency; the Serious Organised Crime Agency) have not received similar acclaim?

18 This article examines relevant Irish jurisprudence, with reference to US jurisprudence where appropriate. For consideration of non-conviction-based asset forfeiture elsewhere, see, e.g., *Assets Recovery Agency v Walsh* [2004] NIQB 21; *Gale v Serious Organised Crime Agency* [2011] UKSC 49; *M v Italy*, Application No. 12386/86, judgment of 15 April 1991; *Raimondo v Italy* (1994) 18 EHRR 237.

19 J. Simser, 'Perspective on Civil Forfeiture' in S. Young (ed.), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar: London, 2009); A. Kennedy, 'Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators' (2006) 13(2) *Journal of Financial Crime* 132.

20 *Gale v Serious Organised Crime Agency* [2011] UKSC 49.

non-conviction-based asset forfeiture, the time is opportune to consider how this issue has been approached in a neighbouring jurisdiction. Non-conviction-based asset forfeiture has also been subject to scrutiny by the Canadian Supreme Court as recently as 2009,²¹ while in the United States the National Institute of Justice has initiated a review of unexplained wealth legislation, drawing upon Irish experiences as one example of international best practice. The fourth, and perhaps the most pressing, reason why focus is centred on the Irish approach stems from concern relating to cooperation between Asset Recovery Offices (AROs) of EU Member States.²² A number of jurisdictions have expressed concern as to the non-conviction-based approach which, in turn, has impacted upon recognition of orders in countries where such a regime does not operate. The Criminal Assets Bureau (as the designated Irish ARO) is playing a key role in attempting to allay such concern through, for example, delivering presentations demonstrating how the Irish model has withstood constitutional scrutiny at the domestic level and how this fits in with rights under the European Convention on Human Rights. The Bureau also provides support at the European level in seeking to achieve recognition of non-conviction-based orders in appropriate cases.²³ A fifth, and related, reason is that there are increasing calls for the EU to adopt a non-conviction-based regime,²⁴ based on the successes of the Irish model. Given these developments the approach of the Irish judiciary, in upholding the constitutionality of the Proceeds of Crime Acts, merits scrutiny. This article argues that the Irish judiciary has been overly deferential (acquiescent even) to the legislative intent. Admittedly this does appear to accord with the separation of powers, yet it is to be expected that the courts will put a check on any attempt by the legislature to exceed its authority. It will, however, be demonstrated that, at least insofar as non-conviction-based asset forfeiture is concerned, the courts have failed to stand up to the legislature. Instead, the courts have focused on the form of the relevant statutory provisions, rather than their substance, giving the State free rein to pursue criminal law objectives under the guise of a civil process. Indeed, it has been said that a markedly consequentialist thinking permeates judicial debate on non-conviction-based asset forfeiture, which stresses the substantial detriment to forfeiture proceedings if due process norms were to be insisted upon.²⁵ Given this, it might be argued that a hybrid, or middle-ground, approach presents a viable alternative approach. Under a middle-ground system of justice, some (but not all) enhanced protections would

21 *Chatterjee v Ontario (Attorney-General)* 2009 SCC 19.

22 Council Decision 2007/845/JHA.

23 Criminal Assets Bureau, *Annual Report* 2010 (Stationery Office: Dublin, 2011) para. 7.3.

24 É. Ó Caollaí, 'Shatter seeking EU-wide Cab regime', *Irish Times*, 21 November 2011.

25 Campbell, 'The Recovery of "Criminal" Assets in New Zealand, Ireland and England', above n. 16 at 32.

be afforded where a person is confronted with punitive civil sanctions.²⁶ There are difficulties with such an approach, however, not least in determining what enhanced protections ought to apply and in what circumstances.

Non-conviction-based asset forfeiture, due process concerns and punitive civil sanctions

The Proceeds of Crime Act is concerned with property that constitutes, directly or indirectly, proceeds of crime. Significantly, the procedure set down in the Act operates outside the conventional criminal justice system. There is no requirement that a person be convicted of a criminal offence before action may be taken under the Act. Indeed, it is not even necessary that criminal proceedings be instituted against a person. The Proceeds of Crime Act operates in the civil sphere. Yet, it would not be appropriate to describe proceedings under the Act as private litigation. It is, in fact, the use of public law powers, by the State, in the civil courts.²⁷ This Act allows the court, prior to the trial of an action, to restrain a person from dealing with assets where the court is satisfied that those assets represent proceeds of crime and are of a certain value. As Finnegan J noted in *McKenna v EH*, the Act of 1996 'creates a statutory right to an injunction to preserve the assets said to be the proceeds of crime'.²⁸ Ultimately, a person might be deprived of any rights in the property concerned. The underlying rationale here can be traced to concern surrounding organised crime-type activities.²⁹ 'Following-the-money' trail, and especially non-conviction-based asset forfeiture, is seen as a central aspect of contemporary measures designed to hit back at those at the upper echelons of crime groups. Often, these people are seen as being beyond the reach of conventional criminal procedures.³⁰ Non-conviction-based asset forfeiture, then, offers an alternative method of bringing these people to 'justice'.

Non-conviction-based asset forfeiture, however, raises serious concerns about circumventing traditional due process protections that are inherent in the criminal process. Lea, for example, has described the non-conviction-based approach as 'a frontal assault on due process'.³¹ It has been said that the Criminal

26 K. Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) Yale LJ 1795.

27 M. Ashe and P. Reid, *Money Laundering: Risks, Liabilities and Compliance*, 2nd edn (Firstlaw: Dublin, 2007) 306.

28 [2002] 1 IR 72 at 81.

29 Meade, above n. 16.

30 Kennedy, above n. 13; Simser, above n. 19.

31 J. Lea, 'Hitting Criminals Where It Hurts: Organised Crime and the Erosion of Due Process' (2004) 35 Cambrian LR 81 at 83.

Assets Bureau and the Irish model of non-conviction-based asset forfeiture together 'indicate a realignment of the approach adopted by the agents of the State in the fight against organised crime, and demonstrate a preference for the needs of the State over the individual's right to due process'.³² Further,

it is significantly easier to prove matters of fact and law to the civil standard of a balance of probabilities than it is to prove the same beyond a reasonable doubt. Even a modest degree of civil content introduced into the strategy, the trading of the criminal standard for the civil standard of proof in the confiscation process, facilitates the task of realizing an attack on the financial elements of crime.³³

Such a radical approach, in which crime-control objectives are pursued using civil processes, has been justified on grounds of inadequacies of the conventional criminal justice approach and in the interests of efficiency and expediency. Yet this 'fails to address why some unknown amount of economic savings should relieve the state of the duty to afford EPP [i.e. enhanced procedural protections] to defendants before forcing them into a position of serving as a negative example or of suffering punishment to deter one's own speculative future misbehaviour without an offer of proof beyond a reasonable doubt and other EPP'.³⁴ It is this bone of contention that causes so much difficulty—a person can be subjected to what is, arguably, a criminal punishment but is stripped of important due process protections. Given this, an alternative approach has been suggested, one in which some enhanced procedural protections are afforded to a person when faced with punitive civil sanctions. Before examining whether such a middle-ground system would be appropriate for non-conviction-based asset forfeiture, we first consider how the Irish courts have responded to the non-conviction-based approach, and how this approach has proved problematic for the conventional civil/criminal dichotomy.

Judicial reaction to non-conviction-based asset forfeiture in Ireland

The seminal decision on the Proceeds of Crime Act in Ireland was delivered by the Supreme Court in *Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB*.³⁵ In that case, it was argued that the provisions of the Proceeds of Crime Act essentially formed part of the criminal law, not the civil law, and that persons affected by these provisions

32 Campbell, 'Theorising Asset Forfeiture in Ireland', above n. 16 at 455.

33 M. M. Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar: London, 2005) 19.

34 A. X. Fellmeth, 'Challenges and Implications of a Systemic Social Effect Theory' (2006) University of Illinois LR 691 at 728.

35 [2001] 4 IR 113.

were deprived of important safeguards inherent in criminal procedure. Specifically, it was contended that the presumption of innocence was reversed, the standard of proof was on the balance of probabilities rather than beyond reasonable doubt, there was no provision for trial by jury, and the rule against double jeopardy was ignored. It was submitted that features of the Act were indicative of its criminal nature, namely:

1. it was of general application;
2. it made no provision for compensation or reparation to victims of alleged crimes;
3. its clear policy was the deterrence of crime;
4. relief under the Act could only be obtained where the assets were shown to be the proceeds of crime;
5. there was an implicit necessity for *mens rea*;
6. the applicant was a senior Garda officer attached to the Criminal Assets Bureau; and
7. powers exclusively associated with the criminal law (for example, search warrants) were used to assist the plaintiff's case.

The appellants relied on the decision in *Melling v O'Mathghamhna*³⁶ in support of their contention that the procedure is essentially criminal in nature rather than civil. They also relied on a number of decisions from the United States in support of their contention.³⁷

Keane CJ, delivering the sole judgment of the court, found that, although the legislation was *unquestionably draconian*, it was compatible with the Constitution. The issue to be resolved was whether proceedings under the Act were civil or criminal in nature, and the court came down in favour of the former. If the court was of the opinion that the civil forfeiture scheme was of a criminal nature, the Act would not survive constitutional scrutiny. As Keane CJ stated:

It is almost beyond argument that, if the procedures under ss.2, 3 and 4 of the Act of 1996 constituted in substance, albeit not in form, the trial of persons on criminal charges, they would be invalid having

³⁶ [1962] IR 1.

³⁷ Specifically, they referred to *Peisch v Ware* 4 Cranch 347 (1808); *United States v Halper* 490 US 435 (1989); *Austin v United States* 509 US 602 (1993); *Department of Revenue v Kurth Ranch* 511 US 767 (1994); *United States v Ursery* 518 US 267 (1996) (although the majority decision does not favour the appellant's contention, they urged the court to prefer the dissenting judgment of Stevens J); and *United States v Bajakajian* 524 US 321 (1998).

regard to the provisions of the Constitution. The virtual absence of the presumption of innocence, the provision that the standard of proof is to be on the balance of probabilities and the admissibility of hearsay evidence taken together are inconsistent with the requirement in Article 38.1 of the Constitution that 'No person shall be tried on any criminal charge save in due course of law.'

It is also clear that, if these procedures constitute the trial of a person on a criminal charge, which, depending on the value of the property, might or might not constitute a minor offence, the absence of any provision for a trial by jury of such a charge in the Act would clearly be in violation of Article 38.5 of the Constitution.³⁸

After a review of the case law, Keane CJ found that the *indicia* of crime set out in *Melling* are not present in the Act of 1996:

In contrast, in proceedings under ss. 3 and 4 of the Act of 1996, there is no provision for the arrest or detention of any person, for the admission of persons to bail, for the imprisonment of a person in default of payment of a penalty, for a form of criminal trial initiated by summons or indictment, for the recording of a conviction in any form or for the entering of a *nolle prosequi* at any stage.³⁹

The Supreme Court, however, was more concerned with form rather than substance. But, as Warren CJ exclaimed in the US case of *Trop v Dulles*, 'How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels posted on them!'⁴⁰ Rather, we must look beyond the face of the legislation to consider whether the provisions of the Act are, de facto, concerned with criminal, as opposed to civil, matters.⁴¹ A useful comparator here can be found in the test currently favoured by the Supreme Court in the United States.⁴² The US test is deliberately chosen here given that:

38 *Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB* [2001] 4 IR 113 at 135–6. Cf. *FJMcK v AF and JF* [2002] IR 242 at 258–9.

39 [2001] 4 IR 113 at 147.

40 356 US 86 at 94 (1958).

41 Cf. G. Pearson, 'Hybrid Law and Human Rights—Banning and Behaviour Orders in the Appeal Courts' (2006) 27 *Liverpool LR* 125.

42 See, e.g., *Hudson v United States* 522 US 93 (1997).

1. the US courts have struggled with the civil/criminal dichotomy for a considerable length of time;⁴³
2. the United States briefly flirted with the idea of a hybrid system of justice;⁴⁴ and
3. the United States is the leading jurisdiction in terms of a non-conviction-based approach to seizing criminal assets.

The first stage of the US test is to consider whether the proceedings were intended to be civil or otherwise. If they were intended to be civil proceedings, the second stage is to consider whether their purpose was so punitive as to override that intent.⁴⁵ Applying this test to the Irish model of non-conviction-based asset forfeiture allows us to examine not only what the legislature intended to create, but also that which was actually created. This goes to the heart of the contention that, in giving judicial imprimatur to the Proceeds of Crime Acts, the Irish judiciary were more concerned with form rather than substance.

Applying the US test to the Irish schema

Stage One—the legislative intent

The Proceeds of Crime Act was clearly intended to be a matter of civil proceedings. Section 8(2) expressly provides that the relevant standard of proof is that applicable to civil proceedings. Moreover, as can be seen from *GM/Gilligan*, the 1996 Act does not have the hallmarks of criminal proceedings. There is no question of arrest, detention, search, or being brought before a court in custody. A person facing proceedings under this legislation is not liable to prosecution with the potential for punishment following conviction. The language of the criminal law is not to be found in the legislation. The Act makes no use of such terms as ‘offence’, ‘prosecution’, or ‘conviction’; such terms would traditionally be seen as associated with criminal proceedings. Instead, the Act refers to the ‘applicant’ and ‘respondent’, terms more closely associated with civil proceedings. Furthermore, the Act makes provision for proceedings to be held otherwise than in public, something which is foreign to criminal proceedings. Insofar as the Irish courts considered the legislative intent behind the Proceeds of Crime Act, they correctly held that the Oireachtas *intended* to create a civil procedure.⁴⁶ That, however, is not determinative. While the Oireachtas may have *intended* to create a civil procedure,

43 See, e.g., *Boyd v United States* 116 US 616 (1886).

44 *Austin v United States* 509 US 602 (1993).

45 This second stage involves reference to the multi-factor test set out in *Kennedy v Mendoza-Martinez* 372 US 144 (1963).

46 Admittedly, though, a punitive intent can be seen among Irish legislators. Cf. Meade, above n. 16.

we must consider what was actually created—intention does not necessarily dictate substance.

In fact, if we look more closely, we see that officers of the Criminal Assets Bureau are able to draw upon significant powers (including powers of entry, search and seizure) that traditionally come within the ambit of the police force. While such powers are commonly associated with the criminal process, the Bureau is able to utilise them in a civil setting to pursue criminal law objectives. Moreover, Bureau officers retain their powers and duties vested in them as a member of An Garda Síochána (Irish police), an officer of the Revenue Commissioners, or an officer of the Minister for Social Protection, as the case may be.⁴⁷ As such, it would not be unusual to see criminal law powers being utilised in pursuit of the functions and objectives of the Bureau, which include the identification of assets that derive, or are suspected to derive, from criminal conduct and the taking of appropriate action to deprive persons of the benefit of such assets.⁴⁸ One example of criminal law powers being deployed within the confiscation regime is the use of opinion evidence,⁴⁹ which has traditionally been reserved for prosecuting terrorist offences and, more recently, organised crime-type activities.⁵⁰ Furthermore, while the Proceeds of Crime Act itself is not concerned with obtaining criminal conviction, nor does it contain the language of the criminal law (insofar as the term ‘proceeds of crime’ can be said to be concerned with non-criminal matters), the reality of the situation is that the Criminal Assets Bureau does, in fact, use the proceeds of crime legislation to target people with criminal convictions, particularly those with convictions for organised crime style activities. The judiciary, however, have failed to provide a check against encroachment of civil processes upon the criminal realm. Commenting on a similarly permissive approach adopted by the US Supreme Court, Charney opines:

This deference to legislative history in determining whether a sanction or a statute is criminal or civil is a gross abdication of the judicial role. Although such an approach appears to be an enlightened attempt to carry out congressional purpose through statutory interpretation, it avoids the substantive question of whether Congress has exceeded its constitutional authority. No amount of congressional labelling should determine that question. When constitutional safeguards are involved, it is the function of the

47 Criminal Assets Bureau Act 1996, s. 8.

48 Criminal Assets Bureau Act 1996, ss. 4–5.

49 Proceeds of Crime Act 1996, s. 8(1).

50 See, e.g., the Offences Against the State (Amendment) Act 1972, s. 3(2).

courts ultimately to decide whether and under what circumstances these protections apply.⁵¹

Stage Two—a punitive purpose?

Looking beyond the form of the legislation, jurisprudence from the United States⁵² and Strasbourg⁵³ are useful in considering the substance of the Proceeds of Crime Act. At this point, it is worth setting out the multi-factor test enunciated by the US Supreme Court in *Mendoza-Martinez*:⁵⁴

1. whether the sanction involves an affirmative disability or restraint,
2. whether it has historically been regarded as a punishment,
3. whether it comes into play only on a finding of *scienter*,
4. whether its operation will promote the traditional aims of punishment—retribution and deterrence,
5. whether the behaviour to which it applies is already a crime,
6. whether an alternative purpose to which it may rationally be connected is assignable for it, and
7. whether it appears excessive in relation to the alternative purpose assigned.

(1) *An affirmative disability or restraint?*

It would certainly appear that non-conviction-based asset forfeiture involves an affirmative disability or restraint. A person may have his use of property restrained, and ultimately forfeited, under the 1996 Act. It would therefore seem that the first limb of the *Mendoza-Martinez* test is satisfied. As Campbell points out, 'Although the effect of the measure on the individual is not decisive in determining whether it is criminal or civil, the imposition of a disability or restraint is nevertheless an important factor when taken in conjunction with other elements which may indicate that the forfeiture process is criminal rather than civil'.⁵⁵

(2) *Historically regarded as punishment?*

The next factor to consider is whether forfeiture has, historically, been regarded as a punishment. The leading Irish jurisprudence in this area can be found in *Attorney-General v Southern Industrial Trust Ltd*⁵⁶ and *Clancy v Ireland*,⁵⁷ which

51 J. I. Charney, 'The Need for Constitutional Protections for Defendants in Civil Penalty Cases' (1974) 59 Cornell LR 478 at 494.

52 For example, *Hudson v United States* 522 US 93 (1997).

53 For example, *Engel v Netherlands* (No. 1) (1979–80) 1 EHRR 647.

54 372 US 144 (1963).

55 Campbell, 'Theorising Asset Forfeiture in Ireland', above n. 16 at 448.

56 [1960] 94 ILTR 161.

57 [1988] IR 326.

demonstrate that forfeiture has traditionally been seen as a civil, and not a criminal, matter. It might well be argued, however, that the Proceeds of Crime Acts 1996 and 2005 are *sui generis* and are not, therefore, comparable to legislation that was in issue in *Southern Industrial Trust Ltd* and *Clancy*. While jurisprudence on forfeiture powers often regards such powers as being remedial in nature, it might be contended that the 1996 Act is, in contrast, of a punitive nature. On the other hand, powers of civil forfeiture have often been justified on the grounds that, although there might well be a hint of punitiveness, the public interest in ensuring that crime does not pay ought to prevail.⁵⁸ The proceeds of crime legislation is, however, utilised by the Criminal Assets Bureau to tackle particular forms of criminality, particularly that associated with organised crime, and, as such, it is certainly arguable that it ought to fall within the criminal paradigm.

Before leaving this strand of the multi-factor test, it is worth briefly turning to the approach in the United States where the Supreme Court, in *US v Ursery*, has referred to ‘our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause’.⁵⁹ The US jurisprudence on this matter, though, is complicated by the earlier decision in *Austin v US*⁶⁰ where it was held that forfeiture was, historically, regarded, at least in part, as punishment. *Austin*, however, was distinguished as the court was there concerned with the prohibition against excessive fines, whereas in *Ursery* the court was dealing with double jeopardy principles. This, however, is a very flimsy distinction. Indeed, as Stevens J, dissenting, noted, ‘punishment’ is ‘a concept that plays a central role in the jurisprudence of both the Excessive Fines Clause and the Double Jeopardy Clause’.⁶¹ He goes on to state, ‘it would make little sense to say that forfeiture might be punishment “for the purposes of” the Excessive Fines Clause but not the Double Jeopardy Clause. It is difficult to imagine why the Framers of the two Amendments would have required a particular sanction not to be excessive, but would have allowed it to be imposed multiple times for the same offence.’⁶²

(3) *The presence of scienter?*

It might well be argued that the *scienter* requirement is satisfied given that the alleged criminal conduct of the respondent will be at the heart of the proceedings.

58 *Ex turpi causa non oritur actio*—no cause of action may be founded upon an immoral or illegal act. *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Beresford v Royal Insurance Co. Ltd* [1938] AC 586.

59 518 US 267 at 287 (1996).

60 509 US 602 (1993).

61 518 US 267 at 305–6 (1996).

62 518 US 267 at 308 (1996).

In fact, given that the Criminal Assets Bureau utilises powers under the Proceeds of Crime Act to target people with criminal convictions, particularly those associated with organised crime-type activities, is there not an implicit requirement of *scienter*? The courts do not think so. This matter was considered by the High Court in the *GM* case, where O'Higgins J stated: 'It is not necessary for the operation of an Order made under the Proceeds of Crime Act that the Respondent be guilty of any crime, nor is it necessary that their conduct be morally reprehensible. It is quite conceivable that an Order could be made against a guiltless person who has possession of goods which are the proceeds of crime'.⁶³ He went on to say: 'No question of *mens rea* or fraud necessarily arises in the Proceeds of Crime Act. It may arise in many cases but it is not necessary. I cannot accept the contention that the "save for the injustice" clause imports *mens rea* into the Act'.⁶⁴ All that is required is that the court be satisfied that the property concerned represents proceeds of crime, that is 'any property obtained or received at any time ... by or as a result of or in connection with criminal conduct'.⁶⁵ This, however, does not require that an offence has been committed by the respondent.

Even where it is established that a party had committed a criminal offence, that does not render the proceedings criminal proceedings.⁶⁶ Proceedings under the Act are *in rem*, rather than *in personam*, hence forfeiture may be granted even where the person in possession of the property concerned is entirely blameless.⁶⁷ This would appear to favour the contention that there is no *scienter* requirement under the Proceeds of Crime Act. The *in rem/in personam* distinction is, however, grounded upon the legal fiction that it is the *rem*, the property itself, that is guilty, not the person in possession of that property.⁶⁸ But as Gallant points out: 'It is of course entirely artificial to say that the property is "at fault". Property has no ability to act on its own; it is controlled or used by an individual'.⁶⁹ In a scathing comment, denouncing the *in rem/in personam* fiction relied upon in the *Urser* case,⁷⁰ Fellmeth states: 'The Court apparently felt that Congress intended not to punish or deter the drug dealer, but rather to teach the house a lesson by transferring its ownership to someone less desirable. That the highest court in the land

63 *Murphy v GM, PB, PC Ltd* [1999] IEHC 5 at [103].

64 *Ibid.* at 105.

65 Proceeds of Crime Act 1996, s. 1, as amended.

66 *Attorney-General v Southern Industrial Trust Ltd* [1960] 94 ILTR 161; *Goodman International v Hamilton* [1992] 2 IR 542.

67 *Calero-Toledo v Pearson Yacht Leasing Co.* 416 US 663 (1974).

68 For consideration of how the notion of guilty property developed into a powerful weapon of law enforcement, see S. J. Pollock, 'Proportionality in Civil Forfeiture: Toward A Remedial Solution' (1994) 62(3) *George Washington LR* 456 at 461 *et seq.*

69 Gallant, above n. 33 at 57.

70 *United States v Urser* 518 US 267 (1996).

could adopt such specious reasoning is perplexing'.⁷¹ Moreover, the (rather tautologous) justification here is that by proceeding against the property concerned, the owner is not punished; the owner is not punished as the proceedings are taken against the guilty property.

(4) *The traditional aims of punishment*

While it has been suggested elsewhere that the non-conviction-based approach 'promotes punishment's traditional aims of condemnation, retribution and deterrence, and so should be viewed as a criminal process',⁷² this section adopts a different perspective as to whether the traditional aims of punishment ought to be afforded such a prominent role. The value of this limb is, it is suggested, dubious. Traditionally, criminal law was said to serve retributive and/or deterrent purposes while civil law was seen as serving restitutionary and/or compensatory purposes. This, however, no longer holds true. Civil proceedings might well result in the infliction of punishment, thus the presence of punishment is not necessarily determinative. Moreover, the presence of retributive or deterrent purposes offers little by way of support. It cannot be said that criminal proceedings serve solely a retributive or deterrent purpose. Furthermore, civil sanctions might also pursue retributive or deterrent objectives. It is submitted that this limb of the *Mendoza-Martinez* test offers little as a distinguishing factor between the civil and criminal paradigms.⁷³ Nonetheless, discussion of this limb does serve a useful purpose in allowing a greater understanding of the purposes of the Proceeds of Crime legislation.

The Irish criminal justice system has, since the 1990s, witnessed significant recalibration. Legislation has been introduced to target those at the upper echelons of organised criminal activity. One such piece of legislation is the Proceeds of Crime Act, designed to separate criminals from their ill-gotten gains, enacted shortly after the murders of Detective Garda Jerry McCabe and the investigative journalist Veronica Guerin. These murders were said to 'represent a defining moment in the battle against subversion and organised crime'.⁷⁴ The adoption of non-conviction-based asset forfeiture was seen as a means of hitting back at criminality, and the underlying punitive feeling is clear to see. In addition,

⁷¹ Fellmeth, above n. 34 at 732.

⁷² Campbell, 'The Recovery of "Criminal" Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm', above n. 16 at 26.

⁷³ The presence of a punitive purpose does, admittedly, play a significant role in relevant Strasbourg jurisprudence. See, e.g., *Ozturk v Germany* (1984) 6 EHRR 409; *Ezeh and Connors v United Kingdom* (2004) 39 EHRR 1.

⁷⁴ Dáil Éireann, Private Members' Business—Measures Against Crime: Motion, 2 July 1996, vol. 467, col. 2364.

the confiscation of assets would, so it was assumed, act as a deterrent in that it would eliminate the incentive to commit crime and also remove the capital for future criminal activity.⁷⁵ It has been recognised that the 'proceeds of crime legislation and the continued and successful efforts of the Criminal Assets Bureau have been of huge significance in the fight against crime'.⁷⁶ As Pollock notes:

The expansion of civil forfeiture is enabling the government to achieve crime enforcement goals both effectively and efficiently. Through confiscation of property connected to illegal activity, the government is able to deter and sanction criminal activity by increasing the economic cost of engaging in such activity.⁷⁷

Deprivation of assets might also be said to affect both a respondent and his family, thereby potentially acting as a further deterrent.⁷⁸ It must, however, be acknowledged that:

While a large body of literature exists regarding the legal issues surrounding forfeiture, little material exists respecting forfeiture's effectiveness in deterring crime. This dearth of research is bewildering in light of the frequency with which the effectiveness of forfeiture is cited in justification of its employment.⁷⁹

Furthermore, it is almost inevitable that a person confronted with proceedings under the Act will experience some form of social stigma.⁸⁰ From this perspective, then, it would certainly appear that the Proceeds of Crime Act would satisfy this limb of the *Mendoza-Martinez* multi-factor test in that it does concern itself with traditional aims of punishment.

75 See, generally, Dáil Éireann, Private Members' Business—Organised Crime (Restraint and Disposal of Illicit Assets) Bill 1996, Second Stage, 2 July 1996. For a critique of such assumptions, see R. T. Naylor, 'Wash-out: A Critique of Follow-the-Money Methods in Crime Control Policy' (1999) 32 *Crime, Law and Social Change* 1.

76 Office of the Director of Public Prosecutions, *Annual Report 2002* (2003) 24.

77 Pollock, above n. 68 at 469.

78 A. Doty, 'Reshaping Environmental Criminal Law: How Forfeiture Statutes Can Deter Crime' (2006) 18(3) *Georgetown International Environmental LR* 521 at 532.

79 I. Crosby, 'Portland's Asset Forfeiture Program: The Effectiveness of Vehicle Seizure in Reducing Rearrest Among "Problem" Drunk Drivers' in M. Pagon (ed.), *Policing in Central and Eastern Europe: Comparing Firsthand Knowledge with Experience from the West* (College of Police and Security Studies: 1996).

80 'CAB claims Hutch is leader of major gang of criminals', *Irish Times*, 3 March 1999.

On the other hand, it might also be suggested that the Act serves a reparative or regulatory function.⁸¹ Thus, in *Gilligan v CAB*, McGuinness J, while recognising that the Act provides 'a method of attacking a certain form of criminality', went on to say that removal of the proceeds of crime 'could well be viewed in the light of reparation rather than punishment or penalty'.⁸² Significantly, the Act does not make provision for the imprisonment of a party facing proceedings thereunder which would *prima facie* indicate that it is not concerned with criminal punishment. While incarceration is not exclusive to the criminal paradigm,⁸³ it is generally indicative of the criminal law at work. The absence of imprisonment as a sanction is highly significant in support of the argument that the Proceeds of Crime Act does not fall within the criminal side of the divide.⁸⁴ In *M v D*, Moriarty J expressed the view that the Act was designed 'not to achieve penal sanctions, but to effectively deprive [*the principals of professional crime*] of such illicit fruits of their labours as can be shown to be proceeds of crime'.⁸⁵ In the case of *US v Ursery*, the US Supreme Court expressed the view that civil forfeiture does not constitute punishment. The court recognised that the provisions in question 'while perhaps having certain punitive aspects, serve important non-punitive goals'.⁸⁶

Just because civil forfeiture might be said to serve non-punitive goals, that does not prevent it from also having a punitive function. With respect, it would appear illogical to suggest that measures designed to deprive criminals of their ill-gotten gains do not also impose a penal sanction. Where a person is suspected of involvement in criminal activity, and it is sought to, essentially, impose punishment on that person (in the pursuit of criminal law objectives), then surely any such punishment must serve punitive purposes. In truth, is there any real distinction to be drawn between a person deprived of property under proceeds of crime legislation on the basis that he has acquired such property from illegal activity and another person subjected to an equivalent criminal fine for his illegal activity?⁸⁷ Or are we to accept that deprivation of assets is simply a form of

81 See, e.g., *Helvering v Mitchell* 303 US 391 (1938).

82 [1998] 3 IR 185 at 217–18.

83 See, e.g., the decision in *Kansas v Hendricks* 521 US 346 (1997). Cf. P. H. Robinson, 'The Criminal–Civil Distinction and Dangerous Blameless Offenders' (1993) 83 *Journal of Criminal Law and Criminology* 693; S. J. Schulhofer, 'Two Systems of Social Protection: Comments on the Civil–Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws' (1996) 7 *Journal of Contemporary Legal Issues* 69.

84 This is not to deny, though, that monetary sanctions can, and do, serve punitive and/or deterrent functions in their own right. For discussion of alternative punishments to imprisonment, see D. M. Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63(2) *University of Chicago LR* 591.

85 [1998] 3 IR 175 at 178.

86 518 US 267 at 290 (1996).

87 Cf. *United States v US Coin and Currency* 401 US 715 (1971).

punishment inflicted upon the property itself, rather than the person in possession or control of that property? Does such deprivation teach the property a lesson?

While there are, therefore, strong arguments both in favour of and against the contention that non-conviction-based asset forfeiture serves the traditional aims of punishment, it must be reiterated, however, that this limb of the multi-factor test is of limited value as the traditional aims of punishment, namely retribution and deterrence, do not easily align themselves within the paradigmatic divide between the *civil* and the *criminal*.

(5) Whether that behaviour is already a crime

The fifth limb of the test asks whether the behaviour with which the proceedings are concerned is already a crime. Before proceeding further, it is worth reiterating that proceedings seeking the civil forfeiture of assets do not require a criminal conviction. Indeed, an entirely blameless party may suffer the loss of property where the court is satisfied that that property represents proceeds of crime. The Act is based on the legal fiction that it is the property that is guilty, not the person in possession. Looking to the definition of 'proceeds of crime' we see that this refers to 'any property obtained or received at any time ... by or as a result of or in connection with criminal conduct'.⁸⁸ While it need not be established that specific property is derived from a specific instance of criminal conduct, the courts must be satisfied that property is derived from criminal conduct. This is particularly important given that, in practice, the Criminal Assets Bureau relies on the Proceeds of Crime Act to target those suspected of, and/or convicted of, criminal activity, particularly that activity associated with organised crime. While a criminal conviction is not required for a person to be deprived of property under the Proceeds of Crime Act, it would appear that, *de facto*, the Bureau uses powers under the Act to target wrongdoers, to impose criminal punishment in the civil process.

(6) and (7) Alternative purpose and excessiveness in relation to its pursuit

Finally, we must consider whether the Proceeds of Crime Act serves an alternative purpose and, if so, whether that sanction appears excessive in relation to that alternative purpose (the sixth and seventh limbs of the multi-factor test). It is axiomatic that the confiscation of ill-gotten assets does serve non-punitive goals, for example it serves preventive and reparative purposes. As McGuinness J emphasised in *Gilligan*:

⁸⁸ Proceeds of Crime Act 1996, s. 1, as amended.

By divesting major criminals of their ill-gotten gains, they [i.e. the police] hope to reduce their power and influence and to render them more vulnerable to arrest, trial and conviction. ... if this money or property can be shown to the satisfaction of the court to be the proceeds of crime, its removal could well be viewed in the light of reparation rather than punishment or penalty.⁸⁹

Just because it does serve alternative purposes, though, does not mean that it cannot also have a punitive element. In *Welch v United Kingdom*, the Strasbourg Court noted the preventive purpose of confiscating property, but went on to say:

it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.⁹⁰

Significantly, the procedure in question in *Welch*, namely the (UK) Drug Trafficking Offences Act 1986, required a criminal conviction as a prerequisite to confiscation and is, thus, distinguishable from the *civil* procedure under the Proceeds of Crime Act. Moreover, in *Welch*, the court limited its decision to the question of retrospective punishment, so that it 'does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking'.⁹¹ With criminal forfeiture, though, a person facing deprivation of property is accorded all the enhanced procedural protections of the criminal process. While his property might be seized—as a preventive measure—with an eye on ultimate forfeiture to the State, such forfeiture cannot occur until it is established, beyond reasonable doubt, that that person is guilty of an offence.

Under the Irish Proceeds of Crime Act the forfeiture of assets occurs in the civil process, so that a person can be 'punished', by the deprivation of assets, simply for being in possession of property suspected of constituting proceeds of crime. The Strasbourg Court has, however, recognised that the confiscation of assets, under relevant Italian legislation, 'pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of

89 [1998] 3 IR 185 at 217–18.

90 (1995) 20 EHRR 247 at para. 30.

91 (1995) 20 EHRR 247 at para. 36. Cf. *Phillips v United Kingdom*, Application No. 41087/98, 12 December 2001; *Grayson v United Kingdom* (2009) 48 EHRR 30.

belonging, advantages to the detriment of the community'.⁹² The court went on to say that confiscation 'is an effective and necessary weapon in the combat against this cancer [i.e. the unlawful activities of the Mafia, in particular drug trafficking]. It therefore appears proportionate to the aim pursued, all the more so because it in fact entails no additional restriction in relation to seizure'.⁹³

Is the use of the civil process, with its reduced safeguards, proportionate to the purposes for which the legislation was enacted? The question of proportionality can clearly be seen in the context of property rights. In *Chestvale Properties Ltd v Glackin*, concerning the power of a company inspector to compel production of documents, Murphy J accepted that the legislation in question did impinge, to an extent, on the property rights of the applicants. But, he went on to say, this was 'a marginal erosion of or interference with incorporeal property rights'.⁹⁴ The intrusion upon the applicant's property rights had to be balanced against the public interest to have an inspector investigate and report on the membership of a particular company.⁹⁵ Similarly, in *M v D*, where powers of discovery under s. 9 of the Proceeds of Crime Act were at issue, Moriarty J abruptly dismissed the contention that s. 9 infringed the provisions of Article 40.3 of the Constitution.

... whilst it may be said that s. 9 does to some extent erode or interfere with property rights, this erosion must be balanced against the public interest inherent in the section, so that no unjust attack on property rights is in fact disclosed.⁹⁶

Clearly, public interest arguments weigh heavily in the mind of the courts. This is particularly evident in the following passage delivered by McGuinness J in *Gilligan*:

While the provisions of the Act may, indeed, affect the property rights of a respondent it does not appear to this court that they constitute an 'unjust attack' under Article 40.3.2, given the fact that the State must in the first place show to the satisfaction of the court that the property in question is the proceeds of crime and that thus, *prima facie*, the respondent has no good title to it, and also given the balancing provisions built into ss.3 and 4 [of the Act].

92 *Raimondo v Italy* (1994) 18 EHRR 237 at para. 30.

93 (1994) 18 EHRR 237 at para. 30.

94 [1993] 3 IR 35 at 46.

95 Cf. *Magee v Culligan* [1992] 1 ILRM 186; *Cox v Ireland* [1992] 2 IR 503.

96 [1998] 3 IR 175 at 184.

This court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.⁹⁷

This is particularly problematic when we consider that an entirely blameless party may be relieved of his assets on the grounds that they represent proceeds of crime. Moreover, it could not be said that deprivation of property under the 1996 Act is simply a marginal erosion of, or minimal interference with, property rights. Yet, the courts have acceded to the idea that the common good may require the confiscation of assets, even where those assets are held by an entirely innocent party.⁹⁸

In 1991, the Irish Law Reform Commission had rejected the option of a civil process to confiscate assets absent the requirement of a criminal conviction, stating:

While a civil procedure of this nature is not without its attractions, it also presents serious constitutional difficulties. The court would, in effect, be depriving someone of their property on the basis of allegations of criminal activity, in respect of which there had been no conviction or proof. In addition, the procedural safeguards surrounding a criminal trial leading to confiscation are absent in civil proceedings. Hence, it might well be held that legislation of this nature would constitute an 'unjust attack' on property rights in contravention of article 43 of the Constitution.⁹⁹

While the Irish courts have come to a contrary conclusion, it is clear that the judiciary have concerned themselves with the form of the legislation rather than its substance and that this has resulted in traditional distinctions between the civil and criminal paradigms being further obscured.

A punitive civil sanction?

Under the Proceeds of Crime Act, the State, in the guise of the Criminal Assets Bureau, is essentially seeking to impose criminal punishment in the civil realm.

97 [1998] 3 IR 185 at 237.

98 *Attorney General v Southern Industrial Trust Ltd* [1960] 94 ILTR 161.

99 Law Reform Commission, *Report on the Confiscation of the Proceeds of Crime* (LRC No. 35, 1991) 51.

Enhanced procedural protections, inherent in criminal procedure, are thereby circumvented in the interests of efficiency and expediency.¹⁰⁰ The Criminal Assets Bureau uses its civil and administrative cloak to target the assets of criminals as a form of law enforcement. In this, the Bureau is permitted to rely on hearsay evidence,¹⁰¹ establish its case on the balance of probabilities,¹⁰² require the respondent to assist the Bureau's investigation by way of obligatory disclosure,¹⁰³ as well as compelling disclosure from third parties, such as solicitors, who have dealings with the respondent.¹⁰⁴ Furthermore, the anonymity of non-Garda bureau officials might be preserved.¹⁰⁵ This might well be described as a middle-ground system of justice,¹⁰⁶ in which punitive civil sanctions are used for crime-control purposes, neatly sidestepping the 'obstacles' that are present in the criminal process. This, however, raises serious concerns for the rights of the individual. The Proceeds of Crime Act has nonetheless received the imprimatur of the Irish courts. If, however, the courts were to recognise the Proceeds of Crime Act as a middle-ground system in which some (but not all) safeguards of the criminal process would apply, then the legitimacy of the confiscation of criminal assets would be strengthened. On the other hand, though, this would, of course, present its own difficulties—not least in determining what safeguards ought to apply in such a middle-ground system. The next section considers whether a middle-ground approach offers an alternative to the conventional civil/criminal dichotomy (especially whether a heightened standard of proof would be appropriate).

A middle-ground system as an alternative?

Middle-ground process refers to any legal process that draws on both civil and criminal elements. The question that must be asked, though, is whether the State should be permitted to impose sanctions in a civil setting. If the sanction is regarded as a criminal one, then the enhanced procedural protections associated with criminal procedure will apply. Even if the sanction is a civil one, we must

100 'The greater the attenuation of the rights of the owner of property, whether by reversal of the burden of proof, or confiscation without a criminal conviction, obligatory disclosure, compelled reports from the owner's professional contacts (banker, lawyer, accountant), or any of the other evidential and procedural devices to be considered, the less costly the proceedings and the more lucrative they are likely to be to the State': P. Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing: Oxford, 2003) 25.

101 Proceeds of Crime Act 1996, s. 8(1).

102 Proceeds of Crime Act 1996, s. 8(2).

103 Proceeds of Crime Act 1996, s. 9(1), as amended.

104 Criminal Assets Bureau Act 1996, s. 14A, as amended.

105 Criminal Assets Bureau Act 1996, s. 10.

106 Mann, above n. 26.

consider whether special procedural protections ought to be applied where the sanction is more than compensatory. The purpose of such special procedural protections is to protect defendants against government over-intrusiveness and from erroneous imposition of a sanction.¹⁰⁷ Middle-ground sanctions would, Mann contends, allow the criminal law to be ‘invoked only when necessary to maintain a public threat of severe punishment for those who cause the most harm in the most blameworthy circumstances’.¹⁰⁸ Surely, though, those engaged in such criminal wrongdoing as armed robbery, drug trafficking, serious fraud, smuggling, directing prostitution, etc.¹⁰⁹ should be dealt with under the criminal law rather than a hybrid civil/ criminal procedure. While recourse to the more cumbersome criminal process, with its enhanced procedural protections, might be less appealing (from a practical point of view) to prosecution authorities, surely this is the appropriate avenue for dealing with such criminal wrongdoing.

Over the past number of years there has been significant ‘slippage’ between criminal and civil procedure—recourse to the civil process, for crime-control purposes, is now being exploited as a means of avoiding the protections of the criminal process.¹¹⁰ In the wake of civil and/or administrative measures being deployed for crime-control purposes, criminal law (along with its inherent safeguards) is arguably playing a less prominent role in dealing with criminal wrongdoing; as the demarcation between the criminal and civil processes blurs, the State (in the guise of the Criminal Assets Bureau) increasingly resorts to civil and administrative methods to target ‘criminals’.¹¹¹ This poses a number of concerns in relation to the rights of the individual, in that due process norms are now being sacrificed to interests of efficiency and expediency. This departure has been justified on perceived inadequacies of the criminal justice system.¹¹² Yet, there is a strong argument that the criminal process ought to be more than sufficient to pursue wrongdoers and to hold them to account. Indeed, a number of people targeted by the Criminal Assets Bureau have been held criminally accountable for their wrongdoing,¹¹³ which would appear to lay waste to the argument (promulgated in the build-up to the passing of the Proceeds of Crime Act

107 Ibid. at 1816.

108 Ibid. at 1861.

109 See, e.g., Dáil Éireann, Written Answers—Garda Operations, 4 October 2000, vol. 523, per Minister O’Donoghue; ‘Hands-on worker has armed raid conviction here’, *Irish Times*, 6 March 1998; ‘After comfortable start, “Dutchy” devotes rest of his life to crime’, *Irish Times*, 20 June 2009.

110 Ashworth and Redmayne, above n. 7 at 14.

111 There would, therefore, appear to be justification for questioning whether the criminal law is, in fact, a lost cause. Cf. A. Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 LQR 225.

112 See, generally, Meade, above n. 16.

113 ‘Gilligan attempt to halt funds seizure adjourned’, *Irish Times*, 19 October 2004; ‘Cab seizes €600,000 of dealer’s assets’, *Irish Times*, 9 October 2007.

and the establishment of the Criminal Assets Bureau) that the criminal process is inadequate when confronted with certain forms of organised criminal activity. If a person is to suffer criminal punishment, along with the potential for moral opprobrium, then the safeguards of the criminal process ought to apply (or, at the very least, some of them ought to!). As Robinson notes:

The central point is to see that there is practical value, not just aesthetic or philosophical value, in maintaining the criminal–civil distinction and the criminal law’s focus on moral blameworthiness. What we have in the past taken to be instances of individual injustice we ought to understand now as injuring all of us, as each such instance incrementally chips away at the criminal law’s moral credibility and, thus, at its power to protect us.¹¹⁴

Admittedly, though, there might be some merit in recognising a middle-ground system, drawing on elements from both civil and criminal processes, in which punitive civil sanctions might be imposed absent some procedural safeguards of the criminal process. So, for example, while the courts might be concerned with the imposition of criminal punishment, reliance might be placed on hearsay evidence. There might also be greater reliance on documentary evidence than one would expect in conventional criminal proceedings. At the same time, though, it is axiomatic that certain safeguards (such as the presumption of innocence¹¹⁵ and the burden of proof being imposed on the State) ought also to apply. One particularly controversial issue is the standard of proof that is to be imposed. Given that proceedings under the Proceeds of Crime Act are concerned with criminal punishment, there is a strong argument that the relevant standard should be that applicable in criminal procedure. Section 8(2) of the Proceeds of Crime Act, however, provides that the standard of proof is that applicable to civil proceedings, namely the balance of probabilities.¹¹⁶ The civil standard of proof has been justified on grounds of difficulties in prosecuting those at the upper echelons of organised crime.¹¹⁷ As Deputy O’Donoghue stated, in the build-up to the passing of the Proceeds of Crime Act in 1996, the Bill was ‘specifically directed at the criminal gangs which have become bloated on the profits of drug dealing

114 Robinson, above n. 83 at 214.

115 The UK Supreme Court came to a contrary conclusion in *Gale v Serious Organised Crime Agency* [2011] UKSC 49, holding that the presumption of innocence does not apply to non-conviction-based asset forfeiture proceedings.

116 *Banco Ambrosiano SPA v Ansbacher & Co. Ltd* [1987] ILRM 669; *Masterfoods Ltd v HB Ice Cream Ltd* [1993] ILRM 145. The UK Supreme Court reached the same conclusion in *Gale v Serious Organised Crime Agency* [2011] UKSC 49.

117 Dáil Éireann, Private Members’ Business—Organised Crime (Restraint and Disposal of Illicit Assets) Bill 1996, Second Stage, 2 July 1996, vol. 467, col. 2463, per Deputy E. Byrne.

and the proceeds of audacious robberies. It permits the Garda Síochána, which is frequently unable to gather admissible conventional evidence against criminal godfathers, to strike at the heart of their criminal empires'.¹¹⁸ As such, the lower civil standard of proof was considered appropriate in eliminating the financial incentives of crime and confiscating the proceeds of crime.

Given the implications of an order under the Act, however, a case might be advanced in favour of a higher standard of proof than a bare balance of probabilities.¹¹⁹ For example, in civil proceedings concerning allegations of criminal wrongdoing the courts might insist on a higher standard than would be the case in proceedings concerning negligence. In such circumstances, a court, according to Denning LJ, 'does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion'.¹²⁰ The Irish Supreme Court has recognised that 'the more serious the allegation made in civil proceedings, then the more astute must the judge be to find that the allegation in question has been proved'.¹²¹ It has also been said that the civil standard of proof—the balance of probabilities—is 'a standard which takes into account the nature and gravity of the issue to be investigated and decided'.¹²²

118 Dáil Éireann, Private Members' Business—Organised Crime (Restraint and Disposal of Illicit Assets) Bill 1996, Second Stage, 2 July 1996, vol. 467, col. 2411.

119 *Bater v Bater* [1951–52] P 35; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247. Cf. R. Pattenden, 'The Risk of Non-persuasion in Civil Trials: The Case Against a Floating Standard of Proof' (1988) 7 CJQ 220; M. Redmayne, 'Standards of Proof in Civil Litigation' (1999) 62(2) MLR 167.

120 *Bater v Bater* [1951–52] P 35 at 37. Similar sentiments were again expressed by Denning LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 258. See also the decision of Lord Scarman in *R v Home Secretary, ex p. Khawaja* [1984] 1 AC 74 at 112–14 which was cited with approval by Hamilton CJ in *Georgopoulos v Beaumont Hospital Board* [1998] 3 IR 132. But see the dissenting judgments delivered by Lord Browne-Wilkinson and Lord Lloyd of Berwick in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

121 *O'Keefe v Ferris* [1997] 2 ILRM 161 at 168. In *Masterfoods Ltd v HB Ice Cream Ltd* [1993] ILRM 145 at 183, there were allegations of anti-competitive practices, which carried potential liability of fines and other penalties. Keane J commented:

'These are civil proceedings and it follows that the applicable standard of proof is that appropriate to such cases, ie, proof on the balance of probabilities. It may well be that that standard should be applied with some degree of flexibility and that the courts should require allegations of particular gravity to be clearly established in evidence. But the Supreme Court have made it clear in *Banco Ambrosiano v Ansbacher* [1987] ILRM 669 that this does not mean that a different standard of proof is to be applied when, for example, an allegation of fraud is being made. I am, accordingly, satisfied that I should apply in these actions the standard of proof normally applicable in civil proceedings, ie, proof on the balance of probabilities.'

122 *Georgopoulos v Beaumont Hospital Board* [1998] 3 IR 132 at 149–50. Concern might be expressed, however, in relation to vagueness and uncertainty. Cf. *Banco Ambrosiano SPA v Ansbacher & Co. Ltd* [1987] ILRM 669 at 701.

Given the nature of proceedings under the Proceeds of Crime Act, there is a strong argument in favour of insisting upon a more rigorous 'civil' standard of proof, one that might well be virtually indistinguishable from that in criminal proceedings. This can be illustrated in *B v Chief Constable of Avon and Somerset Constabulary*, concerning a sex offender order, where Lord Bingham stated that there may be times when the civil standard of proof 'will for all practical purposes be indistinguishable from the criminal standard'.¹²³ Similarly, in *Gough v Chief Constable of the Derbyshire Constabulary*, concerning football banning orders, it was said that the civil standard of proof 'is flexible and must reflect the consequences that will follow if the case for a banning order is made out. This should lead the justices to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard'.¹²⁴ In *McCann*,¹²⁵ a case concerning anti-social behaviour orders, Lord Steyn stated 'in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard'.¹²⁶ Similarly, Lord Hope of Craighead, in holding that the appropriate standard in proceedings for an ASBO was the criminal standard, stated:

But it is not an invariable rule that the lower standard of proof must be applied in civil proceedings. I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made.¹²⁷

If the Irish courts were to adopt a similar approach to that in *McCann*, and insist upon the criminal standard of proof in proceedings concerning the confiscation of assets under the Proceeds of Crime Act, this would go a long way towards respecting the rights of the individual.¹²⁸ Were there a requirement that property could only be confiscated where it is shown, beyond reasonable doubt, that that

123 [2001] 1 WLR 340 at 354.

124 [2002] QB 1213 at 1242–3.

125 *R (on the application of McCann) v Crown Court at Manchester; Clingham v Chelsea Royal London Borough Council* [2003] 1 AC 787.

126 [2003] 1 AC 787 at 812.

127 *Ibid.* at 826.

128 Such an approach has, however, been rejected by the UK courts. See, e.g., *Serious Organised Crime Agency v Gale* [2009] EWHC 1015 (QB) at [9]; *R (on the application of Director of the Assets Recovery Agency) v He and Chen* [2004] EWHC 3021 (Admin) at [50]. The UK legislation explicitly states that the standard of proof to be applied is the balance of probabilities (Proceeds of Crime Act 2002, s. 241(3)). The Irish legislation states that the relevant standard is the civil standard of proof (Proceeds of Crime Act 1996, s. 8(2)).

property constitutes proceeds of crime then the infliction of criminal punishment in a middle-ground system in which some (but not all) criminal law safeguards are present would be much less objectionable.

Conclusion

Conventional understanding distinguishes between civil and criminal paradigms. In recent years, a new tool of law enforcement—non-conviction-based asset forfeiture—has emerged to tackle certain forms of criminal activity, particularly organised crime. The non-conviction-based approach does not, however, neatly fit into the conventional civil/criminal dichotomy. Rather, it represents a hybrid process in which criminal law objectives are pursued in the civil process. And, given that non-conviction-based asset forfeiture operates outside the realm of the criminal process, enhanced procedural protections that are mandated in criminal procedure are conveniently sidelined, which makes the non-conviction-based approach particularly appealing for police and prosecution agencies. This approach does, however, give rise to a number of issues surrounding the diminution of the rights of the individual in favour of concern for efficiency and expediency. Given executive enthusiasm in this respect, it is left to the courts to ensure that criminal punishment is not imposed absent necessary procedural safeguards. Regrettably, though, the courts have come up short in this regard and have acceded, all too easily, to the executive classification of proceedings under the Proceeds of Crime Act as ‘civil’. Commenting on US jurisprudence, Fellmeth states, ‘In deferring to legislative intent in extremis, the Supreme Court has effectively undermined constitutional restrictions on criminal punishment, allowing the legislature to circumvent these restrictions through nothing more than an advantageous choice of words’.¹²⁹ Although domestic courts have proven to be willing to accept the ‘civil’ label attached to non-conviction-based asset forfeiture proceedings, this is not the final say on the matter, however. Non-conviction-based asset forfeiture is expected to come before the European Court of Human Rights in the not-too-distant future,¹³⁰ which will further enlighten discussion of this powerful new tool in the armoury of the State.

129 Fellmeth, above n. 34 at 707.

130 In Ireland, it has long been anticipated that the decision in *Gilligan v CAB* [1998] 3 IR 185 (HC), [2001] 4 IR 113 (SC) would be pursued in Strasbourg, while in *Gale v Serious Organised Crime Agency* [2011] UKSC 49, the UK Supreme Court indicated that this area would benefit from consideration by the Grand Chamber of the European Court of Human Rights.